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October 31, 2019

Kenneth Thompson
195 Falmouth Road, Apt 3C
Mashpee, MA 02649

Re: ***Matter of Thompson***, Docket No. CSSP-175917-DM-19
FINAL DECISION

Dear Mr. Thompson:

Upon a thorough review of the administrative record in this matter, it is my **Final Decision** to permanently revoke your commercial shellfish and seaworms permit DMF ID No. 175917 and appurtenant shellfish transaction card. This revocation is effective immediately. My **Final Decision** is consistent with the **Initial Decision** of the Magistrate in this case.

According to the record, during the period of October 30, 2018 through December 31, 2018 you harvested and sold over 13,000 oysters and in the process of doing so violated numerous state marine fishery laws and regulations at G.L. c. 130, §21 and 67, and 322 CMR §§7.01 and 16.04. Violations include: (1) commercially harvesting and selling oysters taken from Mashpee intertidal waters; (2) commercially harvesting and selling shellfish taken from Falmouth intertidal waters without a commercial shellfish permit issued by the town of Falmouth; (3) failing to timely file and falsifying Division of Marine Fishery trip-level catch reports; (4) failing to properly tag shellfish in accordance; and (5) harvesting or attempting to harvest oysters from a private aquaculture grant site without consent of the grant owner.

These are serious violations, particularly as they can jeopardize public health. Moreover, they negatively impact local shellfish management, private enterprise and property rights, and consumer confidence in Massachusetts shellfish. This ultimately harms the reputation of the state's commercial shellfish industry. It is for these reasons that I take this action to revoke your permit.

Upon receipt of this **Final Decision**, you shall immediately turn over your Massachusetts commercial fisherman permit and shellfish transaction to the Massachusetts Environmental Police or the Division of Marine Fisheries. Unless otherwise notified, you may not apply for, hold or

otherwise be issued any permit, authorization or regulated fishery permit for shellfish or a shellfish transaction card. Any such permit, authorization, or regulated fishery for shellfish that may inadvertently or mistakenly be issued to you shall be null and void.

You have the right to seek judicial review of my **Final Decision** in the Superior Court pursuant to G.L. c. 30A, §14(1). The complaint shall be filed in Superior Court within thirty days of receipt of this **Final Decision**.

Sincerely Yours,

A handwritten signature in cursive script that reads "David E. Pierce". The signature is written in dark ink and is positioned above the printed name and title.

David E. Pierce, PhD
Director

Attachments:

Initial Final Decision

Docket Sheet

Environmental Police Officer Scott Opie (“Officer Opie”), DMF statistics project leader Anna Webb (“SPL Webb”), Mashpee shellfish constable Ashley Fisher (“SC Fisher”), and agency administrative law clerk Jared Silva. The hearing was electronically recorded. The oath was administered to those who testified. The administrative record was compiled at the conclusion of the testimony and introduction of evidentiary documents and is attached hereto.³

My usual practice is to issue a Tentative Decision. At the conclusion of the hearing, I informed the parties that I would follow that practice. Nonetheless, I have decided that in the interests of justice and a speedy resolution of this proceeding, as well as the administrative record and lack of a defense, a Tentative Decision would be pointless. Respondent stated in his summation that if the decision involved a permit suspension he requested that such action be taken “in a timely manner” because the Town of Mashpee was awaiting the results of this hearing before deciding on the status of his town shellfish permit.⁴

Generally, the agency applies the formal rules of adjudicatory procedures at 801 CMR §1.01 for all adjudicatory proceedings. Notice to that effect is provided to both parties at the initiation of a proceeding.⁵ The formal rules provide for a Tentative Decision in those instances where the agency is making its decision on the record without having presided at the reception of evidence. 801 CMR §1.01(11)(c).⁶ My decision to issue an Initial Decision rather than a Tentative Decision finds support in the rules, the due process provisions of G.L. c.30A, and past agency practice.⁷

Based on the above, I am issuing an Initial Decision rather than a Tentative Decision.⁸

BACKGROUND

The following issues for adjudication occurred within the period of time from October 30, 2018 through December 18, 2018, in and around the Towns of Mashpee, Falmouth and Barnstable.

I. Did respondent harvest privately cultured oysters from within a shellfish aquaculture grant site licensed by the Town of Mashpee to a private individual in violation of G.L. c.130, §67?

³ Respondent exercised his right not to testify. No inferences are drawn from respondent’s exercise of his right.

⁴ See electronic hearing transcript at 45.29.

⁵ See docket item, Thompson Show Cause Notice; see also <https://www.mass.gov/service-details/learn-about-dmfs-administrative-law-process>.

⁶ The agency is not bound to comply with the Tentative Decision provision if it provides by regulation that the parties first make a written request in advance asking for a Tentative Decision. G.L. c.30A, §11(7). The agency has not adopted its own rules for adjudicatory proceedings as it is authorized to do, but is in the process of doing so and will no doubt include such a provision. See note 7, below.

⁷ *Matter of Parsons*, Docket No.SSW-174809-DM (2017) (Matters not addressed in 801 CMR §1.00 or for which any party seeks clarity are to be considered in light of the relevant administrative and due process procedures that are contained in G.L. c.30A).

⁸ 801 CMR §1.01(10)(2) provides that “[t]he Presiding Officer shall conduct the hearing, administering an oath or affirmation to all witnesses, making all decisions on the admission or exclusion of evidence *and resolving questions of procedure*. *The Presiding Officer shall file a decision or recommended decision with the Agency within a reasonable time after the close of the hearing.* (Emphasis supplied).

II. Did respondent harvest and sell oysters taken from intertidal areas in the Town of Mashpee in violation of Mashpee shellfish regulations and in violation of 322 CMR §16.04(2)?

III. Did respondent harvest and sell shellfish from intertidal areas in the Town of Falmouth without holding a Falmouth commercial shellfish permit in violation of 322 CMR §16.04(2)?

IV. Did respondent fail to file accurate monthly commercial catch reports with DMF identifying respondent's sale of oysters in violation of G.L. c.130, §21 and 322 CMR §7.01(7)?⁹

If the answers to the above questions are yes, respondent's shellfish activities would constitute serious violations of the shellfish laws of the Commonwealth and regulations of the Towns of Mashpee and Falmouth.¹⁰ In particular, 322 CMR 16.00, commonly referred to as the sanitary shellfish rules, were adopted by DMF in the form of the model regulations of the United States Department of Food and Drugs, National Shellfish Sanitation Program ("NSSP") of which the Commonwealth is a state participating partner. These regulations are specifically designed to protect the health, welfare, and safety of the public from consuming tainted shellfish, and in particular oysters.¹¹

The administrative record in this case includes the following documents introduced and compiled at the hearing:

1. Respondent's 2018 DMF application for a saltwater fishing permit and a regulated fishery special permit endorsement for shellfish and seaworms
2. Respondent's 2018 shellfish harvest, handling and transport affidavit
3. Respondent's DMF permit inventory
4. Town of Mashpee 2018 commercial shellfish permit application
5. Town of Mashpee shellfish regulations
6. Town of Falmouth shellfish regulations
7. Town of Barnstable shellfish regulations

⁹ Commercial catch reports, also known and referred to by DMF as "trip-level" reports, must be filed either on paper forms or electronically by all permit holders on the 15th of each consecutive month. <https://www.mass.gov/service-details/reporting-compliance-table-for-commercial-fishermen>. Respondent agreed to file his catch reports using the electronic method. See respondent's 2018 application for a commercial shellfish permit, respondent's signed 2018 shellfish affidavit; and DMF guidance on e-reporting at <https://www.mass.gov/how-to/report-your-commercial-fishing-harvest-trip-level-reports>.

¹⁰ In accordance with 801 CMR §1.01(10)(f)(1) the claimant presented his case first. The claimant has the burden of proof to establish his case by the "clear weight" or a "preponderance" of the "credible" evidence. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. G.L. c.30A, §11(2).

¹¹ G.L. c.130, §67 prohibits the taking of shellfish from any shellfish aquaculture site licensed by a municipality. Of particular importance are the Commonwealth's sanitary shellfish regulations at 322 CMR 16.00. These regulations establish comprehensive requirements specifically governing the safe handling of oysters, which as a food product are consumed 'in the raw' and can cause far more havoc with the public's health than other species of shellfish, which is cooked prior to consumption. See *Matter of White*, Docket No.SPP-156387-LE (2016) (illness caused by the bacterium *Vp* from ingestion of raw oysters by guests at a wedding reception).

8. Shellfish aquaculture license issued by the Town of Mashpee to Michael Ronhock authorizing the commercial propagation of oysters in a specified intertidal area within the Town of Mashpee
9. DMF designated shellfish growing area maps and sanitary surveys for areas SC12, SC16, SC19 and BB54.
10. Massachusetts Environmental Police incident report #18-549-OF
11. Mashpee shellfish constable's incident reports and citations issued to respondent
12. Minutes of the Mashpee Shellfish Commission meeting on January 8, 2019
13. Mashpee Board of Selectmen's decision to suspend respondent's commercial shellfish permit SC-1016
14. Respondent's 2018 commercial catch (trip-level) reports filed with DMF
15. The Standard Atlantic Fisheries Information (SAFIS) reports of respondent's commercial sales of oysters for October 30, 2018 through December 31, 2019
16. Comparison of seafood dealer transaction slips to SAFIS reported commercial sales

The shellfish fisheries, both in the wild and privately cultivated in Massachusetts, are heavily regulated by the Commonwealth and its municipalities in a cooperative fashion.¹² G.L. c.130, §§52-75 forms the statutory framework for cooperative shellfish development and management in Massachusetts. In general, the framework authorizes DMF to establish baseline veterinary health and sanitary standards required for the commercial harvest and growth of shellfish, while authorizing coastal cities and towns to determine by regulation how the shellfish fishery is managed and conducted in their particular intertidal areas. G.L. c.130, §20 provides financial assistance to cities and towns as appropriated by the Legislature. The actual amount given to a city and town is determined by the Director. Municipalities that receive a state shellfish grant are required to expend at least one quarter of that amount in shellfish development. The purposes of the grants are to increase the supply of shellfish, and maintain a healthy environment for increased populations of shellfish within those coastal cities and towns.

G.L. c.130, 20A creates a program of “self-help” to coastal cities and towns for the cultivation, propagation and protection of shellfish. The Director is required to establish and maintain funds for local shellfish development appropriated from the Commonwealth's tourism and industrial promotion fund. The director expends money to coastal communities in an amount equal to the money spent by that coastal community for local shellfish cultivation, propagation and protection.

The statutory framework requires uniform compliance with both state and municipal laws. One of the goals is to encourage the natural propagation of shellfish and enhance local

¹² G.L. c.130. The Commonwealth's statutory law governing aquaculture alone occupies no less than fifteen specific sections covering the application, issuance, renewal and managing a licensed grant from a coastal municipality to grow shellfish in a specific intertidal areas within the boundaries of that municipality is an extensive process involving a multiplicity of procedures. In addition, marine aquaculture regulations at 322 CMR 15.00 establish a procedural and legal framework for marine aquaculture, including the possession, propagation, culture, sale and disposition of marine organisms, including oysters. Oyster aquaculture management is designed to facilitate the development of a viable oyster aquaculture industry, while protecting wild populations of marine organisms and their natural habitat from degradation or introduction of invasive aquatic species, parasites or diseases. Any person trespassing on a grant or removing oysters from a grant site is subject to treble damages in a civil tort action.

shellfish populations by authorizing the state, in addition to the cities and towns, to enforce municipal regulations that close particular intertidal areas to commercial use, thus, reducing commercial shellfish effort in that particular local intertidal area with the goal of increasing the supply of shellfish. Authority has been given to the DMF Director to sanction commercial shellfish permits he issues in those cases where shellfish is harvested and sold in violation of not only DMF regulations, but municipal regulations as well. Sanctions may include suspensions, revocation, or non-renewal of the permit.¹³

Once a shellfish aquaculture operation is properly licensed by the state and local authorities, the aquaculturist may begin to propagate shellfish at the grant site. The aquaculturist may purchase shellfish seed from sources approved by DMF. The cultured shellfish is the property of the aquaculturist. In order to inform the public as to the location of the grant, the boundaries are marked in accordance with G.L. c.130 §61. This not only addresses potential navigational issues, but also establishes the physical domain of the privately owned shellfish to inform other shellfish harvesters to avoid trespass, damage to the site, or removal of the shellfish or oysters being cultivated.¹⁴

The DMF system of managing shellfish fisheries throughout the Massachusetts coast begins by giving intertidal areas a designated identification number. DMF then classifies each designated area, or portions thereof, as either approved, conditionally approved, restricted, conditionally restricted, or prohibited. The classifications are based on the results of sanitary surveys conducted by DMF of each designated shellfish area. Coastal maps for all designated shellfish areas are readily available on-line, by request, and provided to coastal city and town shellfish officials who in turn distribute them locally.¹⁵

FINDINGS OF FACT

Based on the testimony of the witnesses and the evidentiary documents, I hereby find the following facts:

(1) Respondent is the holder of a 2018 commercial saltwater fishing permit DMF ID No.175920, special permit endorsement for the commercial shellfish regulated fishery and transaction card issued by the Director of DMF. (Claimant's exhibit 3).¹⁶

(2) Respondent agreed on the DMF permit application form that he would comply with the requirement the he file with DMF timely commercial catch reports through the submission of monthly electronic reports. (Claimant's exhibit 2).

(3) Respondent agreed to comply with the conditions and restrictions for the use of his permit as set by the Director on January 18, 2018 establishing additional requirements for harvesting, handling, transporting and selling shellfish. (Claimant's exhibit 3).

¹³ G.L. c.130, §80, and 322 CMR §§7.01(9) and 16.11.

¹⁴ G.L. c. 130 §67 prohibits the taking or attempted taking of any shellfish from a licensed grant site without the consent of the licensee.

¹⁵ See <https://www.mass.gov/service-details/shellfish-classification-areas>.

¹⁶ Claimant's exhibit 1 is the DMF permit inventory of respondent.

(4) Respondent renewed his 2018 commercial shellfish permit ID #SC-1016 issued by the Town of Mashpee. (Testimony of Officer Opie. Claimant's exhibit 17).¹⁷

(5) Respondent was not the holder of a 2018 commercial shellfish permit from the Town of Falmouth. (Testimony of SC Fisher. Claimant's exhibit 11).

(6) Respondent was not the holder of a 2018 commercial shellfish permit from the Town of Barnstable. (Testimony of Officer Opie. Claimant's exhibit 11).

(7) During the period of October 30, 2018 through December 31, 2018, respondent harvested and sold a total of thirteen thousand one hundred and forty three (13,143) oysters. (Testimony of SPL Webb. Claimant's exhibits 14-16).¹⁸

(8) Between October 30, 2018 and December 18, 2018 respondent harvested and sold oysters taken from Mashpee intertidal area SC16, which includes the site of a Mashpee licensed private aquaculture grant. (Testimony of SC Fisher. Testimony of Officer Opie. Claimant's exhibits 8 and 10-13).¹⁹

(9) On October 30, 2018, respondent harvested and sold to Big Rock Oyster Company one thousand sixteen (1,016) oysters from designated shellfish area BB54 in West Falmouth Harbor. (Testimony of SPL Webb. Claimant's exhibits 14-16).

(10) On November 10, 2018, respondent harvested and sold to Big Rock Oyster Company seven hundred and seventeen (717) oysters from designated shellfish area BB54 in West Falmouth Harbor. (Testimony of SPL Webb. Claimant's exhibits 14-16).

(11) On December 18, 2018, respondent harvested and sold to Big Rock Oyster Company eight hundred and forty-seven (847) oysters from designated shellfish area SC12 in Mashpee's Apponogansett Bay. (Testimony of SPL Webb. Claimant's exhibits 14-16).

(12) Respondent harvested shellfish from intertidal areas within the Towns of Mashpee, Falmouth and Barnstable. (Testimony of SC Fisher. Testimony of Officer Opie. Claimant's exhibit's 5-7).²⁰

(13) On January 28, 2019, the Mashpee Board of Selectmen suspended respondent's commercial shellfish permit ID #SC-1016 indefinitely for violations of the Town's shellfish

¹⁷ Respondent stated in his Town of Mashpee 2018 shellfish permit renewal application that he has been a resident of Mashpee for three years, and that he held no other city or town shellfish permits. See Finding of Facts No.13, *infra*.

¹⁸ Except for respondents December 17, 2018 harvest and sale of one thousand fifty-nine (1,059) oysters to the dealer Interbay Seafoods, the remainder of this total is confirmed by dealer transactions reported to SAFIS.

¹⁹ Respondent admitted to SC Fisher that on December 17, 2018 he harvested and sold oysters taken from intertidal areas in the Town of Mashpee.

²⁰ The intertidal areas where respondent harvested shellfish from are DMF designated areas SC9, SC12, SC-16, and BB54.

regulations, and harvesting shellfish from a licensed private aquaculture grant site in Mashpee without consent of the grant licensee. (Testimony of SC Fisher. Claimant's exhibits 10-12).

(14) There were no wild populations of oysters in Mashpee coastal intertidal areas in 2018, nor have there been any wild populations of oysters in Mashpee intertidal areas for decades. (Testimony of SC Fisher. Claimant's exhibit 11).

(15) Respondent did not file his commercial catch reports electronically each month during 2018 as he had elected and was required to do, using the paper method instead. (Testimony of SPL Webb. Claimant's exhibit 14).

(16) On December 2018 respondent filed all twelve commercial catch reports with DMF for that year along with his 2019 permit application. (Testimony of SPL Webb).

(17) During the period October 30, 2018 through December 31, 2018, respondent did not report the harvest and sale of any oysters on his 2018 monthly commercial catch reports filed with DMF. (Testimony of SPL Webb. Claimant's exhibit 14).

CONCLUSIONS OF LAW

The above findings of fact constitute the following violations of law:

(1) The commercial harvest and sale of oysters taken from Mashpee intertidal areas is a violation of the Mashpee shellfish regulations at Art. IV, §2, and 322 CMR §16.04(2).

(2) Harvesting shellfish from Falmouth intertidal areas without a Falmouth commercial shellfish permit is a violation of the Falmouth shellfish regulations at c.275, Art.2, §§ 279(9)(A) and (B), and 322 CMR §16.04(2).

(3) Failing to timely file monthly commercial catch reports with DMF is a violation of G.L. c.130, §21; 322 CMR §§7.01(5)(g)(2), (14)(b), (14)(d), and (14)(f); respondent's permit application shellfish affidavit; and the conditions and restrictions established by the Director for the use of respondent's commercial shellfish regulated fishery special permit endorsement.

(4) Filing false catch reports with DMF that do not report the harvest and sale of oysters in 2018 is a violation of G.L. c.130, §21, and constitutes perjury in accordance with respondent's signed shellfish permit.

(5) Harvesting or attempting to harvest oysters taken from a shellfish aquaculture grant site licensed by a municipality to a private individual is a violation of G.L. c. 130, §67.

DISCUSSION

The burden of proof on all issues to be adjudicated rests with the claimant, in this case the agency, which must show by the "clear weight" or the "preponderance" of credible evidence that its position is justified. *Medical Malpractice Joint Underwriting Association of Massachusetts v.*

Commissioner of Insurance, 395 Mass. 43 (1985); *Doe v. Sex Offender Registry Board*, 428 Mass. 90 (1998). On judicial review, the agency decision must be supported by substantial evidence - "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c.30A, §14(7)(e) and §1(6). See *Deacon Transportation, Inc. v. Department of Public Utilities*, 388 Mass. 390, 396 (1983), citing *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981); *Almeida Bus Lines v. Department of Public Utilities*, 348 Mass. 331, 342 (1965).

The answer to all four issues for adjudication in this case is yes. The Findings of Fact and Conclusions of Law set forth above establish and support this conclusion by the clear weight and preponderance of the evidence. Between October 30, 2018 and December 31, 2018, respondent harvested and sold over thirteen thousand oysters from intertidal areas in the Towns of Mashpee, Falmouth and Barnstable: specifically DMF designated shellfish areas SC9, SC12, SC-16, and BB54. Respondent was not the holder of a Falmouth or Barnstable commercial shellfish permit. Nonetheless, during this time respondent harvested shellfish and oysters for commercial purposes oysters.

Respondent did not file his trip-level reports electronically or on a monthly basis as required. Instead, he submitted all twelve months on paper copies at the time of his permit renewal on December 31, 2018. Moreover, respondent failed to report the harvest or sale of any oysters between October 30, 2018 and December 31, 2018 on his paper catch reports. Given respondent's admission to SC Fisher and Officer Opie that he, respondent, harvested and sold oysters on December 17, 2018, but didn't report this, he knowingly filed a false catch report under the pains and penalties of perjury subjecting his DMF commercial shellfish permit to suspension or revocation.

This case is relatively straightforward. Respondent offered no defense or evidence, either in the form of witness testimony or documentation to rebut the testimony and evidentiary exhibits presented by the claimant. In some areas of respondent's cross-examination, the claimant's witnesses may have admitted to respondent's questions that "it was possible" that another scenario, factor or intervening action may have been responsible for the observation of the witness.²¹

Additionally, respondent's questions during cross-examination at times stated a fact not in evidence or within the knowledge of the witness.²² This approach has little evidentiary use in an adjudicatory hearing where the standard of proof is by a preponderance of the evidence. To be sure, leading questions are the norm in cross-examination, and I provide respondents with a very wide berth. However, respondent attempts to present as a defense to the unlawful harvest of

²¹ During respondent's cross-examination of Officer Opie on the issue of selling shellfish without identification tags, Officer Opie admitted that it was possible that tags were placed on the shellfish, but "blew off" in the wind due to their exposed location out in the open during transportation to the dealer. (Electronic hearing transcript at 41.40)

²² Respondent's cross-examination of SC Fisher asserted that he couldn't have harvested shellfish from the private aquaculture grant in Mashpee on December 17, 2018 because he doesn't own or drive a grey Dodge pick-up truck and "you can check that with the DMV". (Electronic hearing transcript at 27.01). Respondent also stated that he was in Florida at the time of the reported theft of oysters to Fisher. In the absence of some evidence to support this assertion either from a witness or in the form of documents [air, rail, toll fares, or hotel receipts on the date in question] his assertion in the form of a question has no evidentiary value.

oysters from a private shellfish aquaculture grant in Mashpee during his cross-examination of SC Fisher without offering any proof, exhibits or testimony to support his assertions. This is not a criminal forum where the burden of proof is beyond a reasonable doubt. Respondent's questions on cross-examination that seek to establish 'a possibility' that there may have existed other intervening actions that could explain or infer a fact other than the one testified to by the witness – with nothing more – does not rebut the witnesses specific testimony, credibility or shift the burden of proof back upon the claimant.

RECOMMENDATION

Based on the above findings and conclusion, I am recommending that the Director suspend shellfish and seaworm permit ID No.175917, and transaction card issued to respondent for a period to be determined by the Director.

Dated October 29, 2017

By David C. Hoover
David C. Hoover, Esq.
Administrative Law Magistrate
Department of Fish and Game

NOTICE

This is an Initial Decision of the Administrative Law Magistrate. It has been transmitted, with the administrative record to the Director for his Final Decision in this matter. This Initial Decision is therefore not a Final Decision of the Director and may not be appealed to Superior Court pursuant to G.L. c.30A. The Director's Final Decision is subject to the right of judicial review, and will contain a notice to that effect. Because this matter has now been transmitted to the Director, no party shall file a motion to renew or reargue this Initial Decision or any part of it, and no party shall communicate with the Director's office regarding this decision unless the Director, in his sole discretion, determines otherwise.